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No. 91-825

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEBBIE HEAVRIN - - - - - Petitioner

versus

TONY JEFFERS - - - - - Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by this case is whether the circuit court correctly held that a police officer lacks probable cause to arrest a citizen when, ignoring every opportunity to determine from the citizen, the citizen's doctor, an available pharmacological encyclopedia, or trained and physically present narcotics officers, whether the citizen's allergy medication is what it purports to be, she arrests the citizen based on the statement of a single non-narcotics officer's statement that the medication "might be" Valium?

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The respondent, Tony Jeffers, respectfully opposes issuance of a writ of certiorari for the reasons contained in this brief.

COUNTERSTATEMENT OF THE CASE

The petitioner's (Heavrin) statement of procedural history is essentially correct and will not be repeated here. The respondent (Jeffers) writes only to highlight factors weighing against issuance of the writ.

Jeffers attended the 1983 Kentucky Derby with numerous personal possessions, including his prescription allergy pills. As part of a comprehensive search of Jeffers' possessions, Heavrin found the plastic pill vial and inquired about it. Jeffers replied that it contained his prescription allergy medicine. Although the Indiana prescription was in Jeffers' name and contained the name and telephone number of an Indiana physician, Heavrin "thought [Jeffers] was probably lying," because it was a "common answer" to police inquiries about pills.

Heavrin was inexperienced in the identificatin of drugs. Four narcotics officers were at Churchill Downs on Derby Day for the express purpose of identifying drugs. Heavrin elected not to seek the assistance of any of the four, even though the chain of custody shows that she conveyed Jeffers' pills directly to a narcotics officer. Jefferson County Police also had copies of the Physician's Desk Reference (PDR)[1] at the track to assist in identification; Heavrin elected not to refer to it. Heavrin also ignored Jeffers' repeated request that Heavrin call Jeffers' doctor or allow him to do so.

Rather, Heavrin arrested Jeffers, relying exclusively on the comment of another officer (not a narcotics officer) that the pills "might be Valium" and that Heavrin could either arrest Jeffers or throw the pills away.[2] Had she bothered to consult any of the narcotics officers in attendance, each would have told her—as each testified at trial—that he could not identify Jeffers' pills as Valium and that, indeed, the markings on the pills were consistent with those of a generic allergy medication.

Jeffers spent fifteen hours in the Jefferson County Jail and made two subsequent trips to Lounsville for trial, after which all criminal charges were dropped because the pills were indeed Jeffers' allergy medication.

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[1]PDR is a familiar encyclopedia of prescription medicine. It shows pictures of hundreds of pharmacological pills, describes their identifying marks and details their content and use. Jeffers' pills matched the verbal description and picture in PDR for PBZ, a generic allergy pill.

[2]Completely aside from the availability of ample expert advice, Heavrin should have been suspect of this non-expert advice, since police have no authority whatsoever to "throw away" a citizen's property.

Based on the district court's findings of fact after a non-jury trial, the Sixth Circuit held that, under the totality of circumstances, Heavrin lacked probable cause and that her arrest of Jeffers deprived him of fourth amendment rights.

REASONS FOR DENYING THE WRIT

I. The Case Is Entirely Fact-Bound and Does Not Conflict With Any Decisions of This Court or Any Court of Appeals.

Contrary to Heavrin's assertion, *see* Petition for Writ of Certiorari (Petition) at 10-17, this case presents no conflict of cases; neither does it present a novel question of law. Rather, the case presents a simple application of existing authority to the unique facts here.

No litigant has suggested and no court has concluded that the law is less than clear here. The majority of the Sixth Circuit panel held that *Illinois* v. *Gates*, 462 U.S. 213 (1983), stands for the proposition that any determination of probable cause for an arrest is subject to a "totality of circumstances" test. The dissenting judge agreed with this proposition. The panel members disagreed, as Heavrin and Jeffers disagree, solely on the *application* of this legal standard to the facts here. The majority of the panel simply held that *application* of the facts found by the district court compelled the legal conclusion that the totality of circumstances did not give Heavrin probable cause to arrest Jeffers.

Heavrin does not here dispute *Illinois* v. *Gates*, nor does she suggest that it does not govern this case. She simply argues that application of the standard to these facts yields

a contrary result.[3] The result, whether favorable to Heavrin or Jeffers, is narrow and expressly tied to this factual record. It thus has no applicability beyond this case and does not warrant this Court's review.

II. Issuance of the Writ Would Be Premature.

Heavrin also argues that she is entitled to qualified immunity under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), and its progeny. *See* Petition at 14-17. Neither the district nor circuit courts reached this issue and this Court should not reach it prematurely.

Because the district court upheld the constitutionality of the arrest on the merits, it did not reach Heavrin's qualified immunity defense. The Sixth Circuit reversed this legal conclusion and remanded the case to the district court for further proceedings, including a consideration of Heavrin's entitlement to qualified immunity. This Court will thus have ample opportunity to consider granting a writ of certiorari if, upon remand, the district court denies Heavrin's claim of qualified immunity and the Sixth Circuit affirms that denial. Unless then, the issue is premature.

III. Jeffers' Notice of Appeal Was Proper.

Relying exclusively on *Torres* v. *Oakland Scavenger Company,* 487 U.S. 312 (1988), Heavrin persists in her argument that the appellate court lacked jurisdiction because Jeffers' notice of appeal cited to the date the district court's memorandum opinion and judgment became final —that is, when the district court denied Heavrin's motion

[3]Heavrin also suggests that the Sixth Circuit failed to adhere to the district court's factual findings. *See* Petition at 11-13. To the contrary, the Sixth Circuit merely applied the existing legal

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to alter or amend under Fed.R.Civ.P. 59(e)—rather than the date of the original memorandum opinion and order. *See* Petition at 5-10.

This misreads *Torres*, which held that a court lacks jurisdiction over an appeal on behalf of a party not named in the notice of appeal. Here, the district court entered only one final judgment, which only became appealable after the district court ruled on Heavrin's Rule 59 motion. As the Sixth Circuit concluded in denying Heavrin's motion to dismiss the appeal, "[m]isindentification of the ruling being appealed from does not destroy appellate jurisdiction as long as the appellant's intent is apparent and the appellee suffers no prejudice."[4] Those conditions are easily met here.

Heavrin's argument is thus semantic, not jurisdictional, and does not warrant this Court's review.

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standard to the facts as found by the district court. Indeed, only Judge Boggs, in his partial dissent, expressed doubt about the district court's factual findings and would have remanded this issue for further findings.

[4]The Court cited for this proposition *United States* v. *Willis*, 804 F.2d 961, 963 (6th Cir. 1986); *Taylor* v. *United States*, 848 F.2d 715, 717 (6th Cir. 1988); and *McLaurin* v. *Fischer*, 768 F.2d 98, 101 (6th Cir. 1985).

CONCLUSION

For these reasons, the petition presents a narrow issue of applying undisputed law to the unique facts of this case. The Sixth Circuit's application of the clear law to these facts is of limited applicability beyond this case. In addition, Heavrin's qualified immunity arguments are premature and her jurisdictional argument is simply wrong. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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